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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN OPPOSITION

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BRIEF OF RESPONDENT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN OPPOSITION

QUESTIONS PRESENTED

1. Whether, in the context of findings of twenty-six separate indicia of bad faith refusal to bargain, an employer, who was willing to enter into an agreement so long as it contained only the terms of its "take-it-

or-leave-it" offer, without good faith bargaining, either before or after its offer, and who was willing to meet and talk with the union, may be held not to have violated Section 8(a)(5) of the Act because the employer included in its offer everything it felt was warranted and right and expressed a willingness to change its offer if the employer could be satisfied that due to changed conditions or new facts its offer fell short of being right.

2. Whether the Board may consider as evidence of bad faith refusal to bargain, the employer's use, as a substitute for genuine negotiations with the union, of a massive communications program directed to its employees, which included misrepresentations of fact, threats of reprisal and promises of benefit, for the purpose not only of undercutting the union's bargaining position but also its authority as bargaining representative.

3. Whether, in finding that the totality of the employer's conduct constituted a violation of Section 8(a)(5), the Board properly relied upon evidence which established the complementary character of the employer's failure to make any effort to resolve issues at the bargaining table and its campaign among employees to disparage the union and to impose without substantial alteration the employer's offer.

4. Whether the bargaining order herein fairly apprises the employer of the conduct prohibited.

5. Whether, as one of numerous bases for entering a general order to cease and desist refusing to bargain in good faith, the Board properly determined that it was a *per se* violation of Section 8(a)(5) of the Act for the employer to offer to the union on a "take-it-

or-leave-it" basis a new accident insurance program and then refuse the union's request for bargaining with respect thereto for the asserted reason that both the employer and the union were parties to an agreement in which they waived their right to insist on opening the subject of insurance until a date which had not yet been reached.

6. Whether it was a *per se* violation of Section 8(a)(5) of the Act for the employer to refuse to furnish to the union cost estimates of contributory insurance and pension proposals offered by the employer, where the employer used such cost estimates in preparing its offer and insisted at the bargaining table that higher costs would jeopardize its business.

STATEMENT OF THE CASE

The Board's Finding of Fact

In the court below the petitioner made no attack on the substantiality of the evidence to support the Board's findings of fact. And, of course, it makes no such attack here. These findings of fact contain at least twenty-six indicia of GE's bad faith which in "totality" constituted the general violation of Section 8(a)(5) (C-9).[1] These findings are entirely ignored by petitioner in its framing of the questions which are allegedly presented for consideration by this Court. Rather, petitioner has isolated particular aspects of

[1] References to "C" followed by a number are to the Board's decision and the Trial Examiner's Intermediate Report as printed in Appendix C submitted by the petitioner with its petition for a writ of certiorari. References to "A" followed by a number are to the decision of the Court of Appeals for the Second Circuit as printed in Appendix A to the petition for a writ of certiorari.

GE's conduct which the Board and the court below did not consider apart from the rest of the facts. For even as to each of the *per se* violations, the Board in addition to the *per se* determination, also found bad faith. The following twenty-six indicia of GE's bad faith were found by the Trial Examiner, whose findings in these respects were adopted by the Board and affirmed by the court below:

1. "[A] deliberate design to undermine employee faith and confidence in the Union's leadership and in the efficacy of the collective bargaining process" (C-235-236). GE's "bargaining stance and conduct, considered as a whole, were designed to derogate the Union in the eyes of its members and the public at large" (A-40).

2. "[A] determination on its part to rely *entirely*" (emphasis the Trial Examiner's) on the effectiveness of its communications to employees "to achieve acceptance of its contract proposals", thereby "engaging in negotiation with an attitude that was one of evasion rather than fulfillment of its statutory obligation" (C-227, 229; affirmed, A-45-46).

3. "[A] conscious and deliberate purpose to play on the employees' fears and insecurities," which it carried out by threats of reprisal and promises of benefit, seeking to gain acceptance of its offer through coercing employees away from support of the Union's position (C-235-236, 247).

4. The announcement of its "fair, firm offer" which "amounted in effect to a unilateral determination of employment terms; leaving negotiations thereafter * * * an empty exercise with predetermined results" (C-220). The "take-it-or-leave-it approach ('fair, firm offer')

to negotiations in general * * * emphasized both the powerlessness and uselessness of the Union to its members" (A-40).[2]

5. Entry into the sessions preceding announcement of its "fair, firm offer" "without any intent to attempt to reach agreement" (C-214-215; affirmed, A-42).

6. Establishment and considering itself bound by the expressed policy of embodying its determination of what is "right" in a "fair, firm offer" unchangeable except on showing of a factual error or new facts and by the expressed policy of "uniformity" as to all the 100 odd unions representing its employees, which two policies were applied by GE "in conjunction" so that at the bargaining table GE made no attempt to reach agreement with the IUE but instead engaged in mere surface bargaining (C-219-220, 228, 240-241; affirmed, A-47 and fn. 15).

7. "[H]aste", in the circumstances of GE's "fair, firm offer policy" and its "uniformity policy", "to publicize its offer" which "reflected the want of an earnest effort on its part to seek through the processes

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[2] The petition (pp. 9, fn. 5, 20) asserts that the record does not support the court's characterization of GE as making "take-it-or-leave-it-proposals" (A-40, 41, 46). Petitioner, as proof to the contrary, quotes the Trial Examiner as stating that GE did "not initially present its offer on an avowed 'take-it-or-leave-it' basis" (C-40). But the Trial Examiner starts off his next sentence with "It professes" (C-40), meaning GE professes, which establishes that the important word in the prior sentence was "avowed", that the avowal was mere profession, not actuality. And throughout the Intermediate Report (C-44-45, 215, 218-220) the Trial Examiner found GE had so committed itself to the offer that it could "not thereafter consider with an open mind proposed concessions, compromises, or other suggested solutions of differences" (C-218). The Board found that GE was less able to bargain than the usual take-it-or-leave-it employer (C-7).

of collective bargaining a possible basis for mutual agreement" (C-218; affirmed, A-45-46).

8. Refusal "to discuss freely and fully the respective claims and demands", and its refusal "to justify them in reason" but instead registering "impatience with the Union's efforts to have it justify its bargaining positions, and at times, when asked to do so, either refus[ing] or shift[ing] to other reasons which it stated in terms so vague or arbitrary as to stifle further meaningful discussion" (C-249; affirmed, A-42-43).

9. Communications to employees, which placed "a cost estimate on the Union's demands that it later declined during negotiations to justify to the Union" (C-228-229, fn. 129; affirmed A-10-12, 25-26).

10. Criticism to employees, in its communications prior to August 30, of the Union's demands "before first discussing them with the Union" (C-228-229, fn. 129).

11. Arguing as to some subjects "its positions more fully to employees than it did to the Union in the conference room" (C-228-229, fn. 129).

12. Communications to its employees, in which it "advanced arguments not only more full but different from those presented to the union negotiators at the bargaining table" (C-234).

13. "[O]ne-sided reporting to employees of the progress of the negotiation, while professing a purpose to keep employees 'fully informed' " (C-229, fn. 129, 230).

14. "[E]fforts through its massive communications program, which included misrepresentations of fact (footnote omitted), to discredit the IUE leadership in the eyes of the employees and otherwise to drive a

wedge between the Union and its members" (C-248-249).

15. "[A] virulent attack on the Union's election plans and on the motives and integrity of the IUE top leadership, containing in part misrepresentations of fact", a tactic which had been decided upon by GE "long in advance of the negotiations", reflecting "an attitude inconsistent with good-faith recognition and dealing with the Union" (C-232).

16. "The very massiveness of the communications program", which was "in itself a measure of [GE's] determination to deal essentially, not with the employees through the Union, but with the Union through the employees, evidencing * * * a purpose to undercut not only the Union's bargaining position, but its authority as bargaining agent as well" and showing "a frame of mind antithetical to simultaneous good-faith bargaining in the conference room" (C-231; affirmed, A-45).

17. "[B]ypassing the Union as national bargaining agent in an effort to deal directly with IUE locals on strike-truce terms," in a manner "incompatible with simultaneous good-faith dealing with the Union at the bargaining table" (C-248; affirmed, A-38).

18. "Bypassing" the Union by inviting and encouraging "employees to discuss directly with plant management questions they might have about the offer, and at one large plant" the holding of "a series of round-table meetings for that purpose" (C-230-231; affirmed, A-45).

19. "Bypassing the Union" and "contact" with IUE local officials "directed in an effort to persuade them to alter the time fixed for the balloting and the questions to be voted on" (C-232; affirmed, A-45).

20. Rejection on the eve of the strike of the "Union's request for a reduced committee, three on each side, to attmpt to work out differences so as to avoid a strike" (C-144, 250).

21. Insistence "on 'gold fish bowl' bargaining'" indicating "that it was infinitely more concerned with publicizing its positions directly to employees than *with making an earnest effort* to explore the possibilities of finding common ground" (C-250-251).

22. Refusal on October 14, "to produce its pension plan language until full agreement was reached" (C-251; affirmed, A-43).

23. Refusal on October 19, "to put on the table the complete agreement it was prepared to sign unless and until the Union first expressed its *unqualified* (emphasis the Trial Examiner's) acceptance" (C-251; affirmed, A-43-44).

24. The "flat refusal, not satisfactorily explained, to enter into a strike settlement agreement labeled as such, or one bilateral in form, and its insistence upon substituting a 'letter of intent'" (C-251; affirmed, A-44).

25. "[R]efusal to furnish the Union with relevant and necessary information" which "strongly supports a finding of overall bad faith" since it "was intimately bound up with its attitude * * * that its offer was not open to serious challenge, once presented" (C-248; affirmed, A-33-34, fn. 10, 41-43).

26. "[P]resentation of its personal accident insurance proposal to the Union on a conceded take-it-or-leave-it basis [which] constituted a rejection of the principle of collective bargaining * * * reflecting adversely on [GE's] general attitude toward collective bargaining" (C-123; affirmed, A-21-22).

The Board's Order

The Board's order (C-10, 258-262) is in the usual broad general form. GE was ordered to cease and desist from refusing to bargain collectively in good faith with the IUE (C-258). There is no affirmative bargaining order. Nor is there any specific provision in the order which reflects the *per se* violation found based on the avowedly take-it-or-leave-it presentation of the accident insurance program.

With respect to the *per se* violation based on refusal to furnish information, GE is ordered to cease and desist from "Failing or refusing, upon request, timely to furnish the IUE with information necessary or relevant to bargaining issues involved in national level collective bargaining" (C-259) and to take the affirmative action of furnishing IUE

> "(1) the cents per month premium, per employee, and also for employee dependents, of each insurance benefit improvement added to the Insurance Plan provided for in the 1960-1963 Agreement relating thereto;
>
> "(2) the estimated monthly average net cost per employee, and also for employee dependents, to the Company of each such insurance benefit improvement, computed from the cost estimates prepared and maintained by the Company for its own use in making calculations of that kind; and
>
> "(3) the estimated average cost in cents per hour per employee of each added increment in Pension Plan benefits provided for in the 1960-1963 Agreement relating thereto, computed from the cost estimates prepared and maintained by the Company for its own use in making calculations of that kind." (C-260)

The order (C-10, 258-262) contains no provision which by its terms limits or prohibits communications

to employees nor which requires the employer to alter its bargaining policy or in the alternative to refrain from communications to employees, despite the petitioner's phrasing its questions presented as if the Board had so ordered (Pet. p. 3). The only such limitation, prohibition or alteration which could ensue from the order arises solely from the direction to cease and desist from refusing to bargain collectively in good faith or in any like or related manner interfering with, restraining or coercing its employees (C-258-259).

The Decision of the Court of Appeals

All three judges of the court below agreed that by refusing to furnish cost information and in bypassing the IUE-GE Conference Board, GE violated Section 8(a)(5) of the Act (A-30-38, 55, 57). The majority of the court sustained the Board's order in full (A-54, 55).

One judge, dissenting only as to the Board's general order to cease and desist from refusing to bargain, expressed his view that "other specific conduct of the Company, such as that in regard to the effective date of the pension plan * * * and the form of the strike settlement agreement, * * * could properly have been condemned and an appropriate order framed" (A-57) but he disagreed with the Board's basing of its findings and order on GE's entire course of conduct. Although no specific provision in the Board's order rests on the *per se* violation based on the refusal of GE to bargain about its proposal to the IUE of an accident insurance program, the dissenting opinion expressed disagreement with the Board's determination of a *per se* violation in this regard (A-57).

The opinion of the court below stated that "the facts of this action demonstrate an absence of subjective

good faith" on GE's part (A-53). The court summed up GE's "take-it-or-leave-it" maneuvers by stating (A-41-42):

> "[T]he Board could appropriately infer the presence of anti-Union animus and * * * could reasonably discern a pattern of illegal activity designed primarily to subvert the Union. * * * GE displayed a patronizing attitude towards Union negotiators inconsistent with a genuine desire to reach a mutually satisfactory accord."

Willingness to sign a contract on GE's take-it-or-leave-it terms was not viewed by the court as inconsistent with finding that GE had no genuine desire to reach agreement. The court stated (A-51):

> " '[D]esire to reach agreement' may mean different things to different people, but in the context of a meaningful and purposeful reading of Section 8 (a)(5) it must mean more than a willingness to sign a piece of paper. The statute does not say that any 'agreement' reached will validate whatever tactics have been employed to exact it. To imply such a Congressional purpose would be to encourage parties to make their violation so blatant that it would be impossible for the other side to continue to exist without signing. Instead the statute clearly contemplates that to the end of encouraging productive bargaining the parties must make 'a serious effort to resolve differences and reach a common ground,' *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 486, 487, 488 (1960), an effort inconsistent with a 'predetermined resolve not to budge from an initial position'. *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 154-155 (1956) (Frankfurter, J., concurring)."

Considering GE's free speech arguments, the court held that Section 8(c) did not bar the Board from

relying on GE's communications activities in determining that GE had violated Section 8(a)(5). Reviewing the applicable legislative history the court held that "the objective of Section 8(c) * * * was to impose a rule of relevancy" (A-48-49), that Section 8(c) was intended only to exclude speech when it was entirely unrelated to conduct. The court found that here the communications program was both interrelated and relevant (A-48-49). The court stated (A-45-46):

> "The Company's stand * * * would be entirely inexplicable without the background of its publicity program. Only when viewed in that context does it become meaningful * * * GE, the Trial Examiner found, chose to rely 'entirely' on its communications program to the virtual exclusion of genuine negotiations, which it sought to evade by any means possible. * * * The aim, in a word, was to deal with the Union through the employees, rather than with the employees through the Union.
>
> * * *
>
> "* * * [I]ts communications approach determined its take-it-or-leave-it bargaining strategy. Each was the natural complement of the other."

The tender of the accident insurance proposal accompanied by the absolute refusal to bargain with respect thereto, in the court's view, as in the Board's, was anti-union motivated (A-21, 22, 24) as well as a *per se* violation of Section 8(a)(5) (A-23-25). The court construed Section 8(d) as only designed "to protect the status quo" (A-19-21) and GE's offer of the accident insurance program admittedly disrupted the status quo (A-18, 24).

Similarly, the refusal of GE, during the course of negotiations, to supply the union with requested information as to the cost of GE's pension and insurance

proposals, in the court's view, as in the Board's (C-191, 248), constituted bad faith (A-33-34, fn. 10) as well as a *per se* violation (A-32-33). The court pointed out that the "cost information the Union wanted was put in issue by the Company's repeated references to cost as a justification for rejecting the Union proposals" (A-28) and that "GE had most of the information in some form that would have been useful to the Union" (A-33).

The generality of the order, being merely a direction to cease and desist from refusing "to bargain collectively in good faith with the IUE" (C-258), was held unobjectionable, relying upon the holding of this Court that "Once good faith is found wanting, the scope of relief to be given by the Board is largely a question of administrative discretion." *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 156 (1956) (Frankfurter, J., concurring) (A-54, fn. 19).

REASONS FOR DENYING THE WRIT

I.

NONE OF THE QUESTIONS STATED IN THE PETITION IS PRESENTED BY THE RECORD BELOW.

A. The premise of the First, Second and Third Questions that GE had a "genuine desire to reach agreement" is negatived by the Board's contrary finding which was sustained by the Court of Appeals.

The first question which petitioner alleges is presented relates to "an employer who has been found to have a genuine desire to reach agreement" (Pet. p. 2). And in its reasons for granting the writ, petitioner (p. 13) asserts that "This Company genuinely desired to reach agreement with the Union and the fact was so found (App. C-207)." The cited page of the Intermediate Report contains only a statement by the Trial

Examiner of GE's contention, not any finding by the Trial Examiner.

Neither the Board nor the Trial Examiner made the asserted finding. Instead, they found the opposite. The Intermediate Report contains repeated findings that GE participated in purported negotiation meetings "without any intent to attempt to reach agreement" (C-214-215, referring to the first four weeks of meetings with respect to employment security); that GE "was determined—certainly after the resumption of meetings on September 20—merely to go through the motions of bargaining in the conference room" (C-236); that GE's "haste to publicize its offer reflected the want of an earnest effort on its part to seek through the processes of collective bargaining a possible basis for mutual agreement" (C-218); and, referring to the entire period, that GE "considered itself bound by expressed policies or positions", namely its policy of a "fair, firm offer" and its policy of uniformity as to all 100 unions representing its employees, "that * * * reflect[ed] a cast of mind against reaching agreement' " (C-228).

The Board adopted all the foregoing findings and, quoting from *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring), stated that "good-faith bargaining means more than 'going through the motions of negotiating' " (C-4), that GE's course of conduct "scarcely evinces a sincere desire to resolve differences and to reach a common ground" (C-8).

The court affirmed all of the Board's findings in this regard and characterized the record as disclosing that GE had an attitude "inconsistent with a genuine desire to reach a mutually satisfactory accord" (A-42, 51-52).

The second and third questions as stated in the petition (p. 3) similarly adopt the premises of the first question stated. Without repeating the description of bargaining policy set forth in the first question, the second question adopts it by reference, using the phrase "this bargaining policy" in a context that could only have reference to the first question. Similarly, the third question refers to the "employer's bargaining policy", without further description.

Thus the first three questions pose legal issues not raised by the record below because they assume a state of facts the exact contrary of what the Board and the court below found.

B. The further premise of the First, Second and Third Questions, that GE met and conferred with the Union in furtherance of a genuine desire to reach agreement and engaged in a course of bargaining, is negatived by the Board's contrary finding.

The first, second and third questions as stated in the petition (pp. 2-3) are not only erroneously premised on the assumption that the employer had a genuine desire to reach agreement but in addition rest on the further erroneous premise that the employer for the purpose of carrying out that desire, met and conferred with the union and engaged in a course of bargaining. And in its reasons for granting the writ, the petition describes GE as having "met, conferred and negotiated" (Pet. p. 16) and as having engaged in "three months of negotiations during which the parties met and discussed each other's demands and proposals" (Pet. p. 13).

The Trial Examiner found that at no time during those months did GE actually negotiate with the IUE. With respect to the six weeks of meetings preceding

GE's presentation of its offer, the Trial Examiner found they were not negotiating sessions because GE made them mere "listening" sessions (C-214-216), stating "if any genuine bargaining were to occur, it had to begin at the time [GE's] offer was made" (C-217). With reference to the pre offer meetings the court agreed there was no bargaining (A-42). GE's offer when made was "unresponsive" to what transpired before (C-217, 220). In the context of its "fair, firm offer" and "uniformity" policy, by publishing its offer before any meaningful discussion of it with the IUE could take place, as the Trial Examiner (C-220), the Board (C-6-7), and the court (A-43-46) found, subsequent the meetings between GE and IUE constituted "an empty exercise with predetermined results."

C. The premise of the Second and Third Questions that GE's communications sought to influence employees in support of GE's bargaining policy, is contrary to the findings of the Board and the Court that GE relied exclusively on communications as a substitute for the bargaining which should have been but was not.

The second and third questions assume that GE's communications policy involved the issuance of views, opinions and arguments to employees in support of GE's bargaining policy (Pet. p. 3). In its reasons for granting the writ, the petition states that communications were condemned "not because they contained threats or promises of benefit but because they conveyed a policy of firmness in bargaining of which the Board disapproved" (Pet. p. 12).

Nothing in the decision of the Board or the court below suggests the slightest criticism of an employer presenting its views, opinions or arguments to em-

ployees to persuade them of its fairness. Rather the Trial Examiner, the Board and the court found that the GE's communications program constituted an attempt by GE to deal with the Union through the employees rather than with the employees through the Union, thus distorting the accepted approach (C-226-227, affirmed A-45); that GE's "communications program was such as to disclose a determination on its part to rely *entirely* (emphasis in original) on its effectiveness to achieve acceptance of its contract proposals" and that GE "was sitting out the negotiations while waiting for that program to have its corrosive effect" (C-227-229, affirmed A-45); that GE relied on its massive communications program "as a substitute for genuine bargaining" (C-231-232, affirmed A-45); and that GE was determined "merely to go through the motions of bargaining in the conference room and to rely entirely on the effectiveness of its direct 'sales' approach to employees to resolve the bargaining issues in its favor" (C-236; affirmed A-45-46).

D. The premise of the Second, Third and Fourth Questions that the Board's order attempts to regulate or limit freedom of speech has no basis in the Board's order.

The second question asks if the NLRB may "limit or prohibit" communications (Pet. p. 3); the third question asks if the NLRB may require an employer "to refrain from communicating" his bargaining policy to employees (Pet. p. 3); the fourth question asks how specific the order must be which attempts "to regulate or limit freedom of speech" (Pet. p. 3). The Board's order (C-10, 258-263) has no provision which by its express terms limits or regulates GE's communication to its employees other than the usual notice posting requirement common to all Board cease

and desist orders. Nor is there any provision which impliedly limits or regulates communications as such. Rather the order follows the conventional form of requiring GE to cease and desist from (1) refusing to bargain in good faith; (2) refusing to furnish necessary information; (3) bargaining directly with locals; (4) discouraging union membership; (5) in any like or related manner interfering, restraining or coercing (C-258-259). The affirmative action directed is (1) to furnish specified information; (2) offer certain named employees reinstatement; (3) make them whole; (4) make available records necessary for the computation of back pay; (5) post notices; and (6) notify Regional Director of compliance (C-260-262).

The second, third and fourth questions urged in the petition (p. 3) are not presented by the record below.

E. The Fifth Question relates to an issue which was not made the basis of any specified provision in the order but was one item among many which in totality support the general order to cease refusing to bargain in good faith.

Although the Board (C-2, and fn. 3, 56-60, 213) and the court (A-18-25) found that GE's refusal to bargain with respect to its proposed accident insurance program constituted both a *per se* violation of Section 8(a)(5) and an indicia of subjective bad faith, no specific provision in the order relates to these findings. Rather both the *per se* finding and the bad faith finding are merely one among at least twenty-five other findings of indicia of bad faith which in totality support the general order to cease and desist refusing to bargain in good faith (C-10, 258). Except for the direction to cease and desist refusing to bargain in good faith, no other provision in either the cease and

desist portion (C-10, 258-260) or the affirmative portion of the order (C-10, 260-262) is based on these findings.

In such a setting the issues relating to GE's refusal to bargain about the accident insurance program do not present a question for review by this Court.

F. The premise of the Fifth Question that GE's proposal of the accident insurance program constituted a benefit is not supported by the record.

The fifth question stated in the petition relates to an employer who voluntarily proposes "an added benefit to the union" (Pet. p. 3). There is no finding by the Trial Examiner, the Board or the court that GE's offer of its non-contributory insurance program constituted in any respect a benefit. Rather the Trial Examiner's description of the proposal emphasizes its detrimental features: the employees would pay the entire cost; the union's claim that the rates were too high and that it would prejudice the opportunity to negotiate improvements when contract negotiation time arrive (C-57-58). The court rejected as "illusory" GE's contention that it was offering a benefit and explained why (A-21).

Hence if any issue relating to GE's refusal to bargain about the accident insurance program is presented by the record below for review by this Court, it is not here in terms of a finding that a benefit was proposed, as the fifth question framed by the petition (Pet. p. 3) assumes.

G. The premises of the Sixth Question that GE did not plead inability to pay and that the cost of changes in pension and insurance plans was too speculative and conjectural for disclosure are negatived by the Board's contrary findings which were sustained by the Court of Appeals.

The sixth question relates to "an employer who has not pleaded inability to pay" (Pet. p. 4). The Board found that GE based much of its justification for its offer on "the asserted jeopardy to the success of its business and to employee jobs that any enlargement of the costs of its offer would entail" (C-187-188, 235). The court agreed that GE had put costs in issue by rejecting union demands as "astronomical" or "costly" (A-25-28, 33). GE misreads *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956) in asserting that the case limits the duty of an employer to disclose to instances "where the employer mechanically repeats an argument of inability to pay" (Pet. p. 36 fn. 46). This Court used the expression "mechanically repeats" not to suggest that any one form of putting cost data in issue was required but rather to emphasize the hollowness of a claim asserted, as here, "without making the slightest effort to substantiate the claim" (351 U.S. at p. 153).

The sixth question is further premised on the assumption that the information which GE could have given the union about the costs of GE's own offer of pension and insurance benefits was "necessarily speculative and not matters of fact" (Pet. p. 4). This ignores the Board's finding (C-189-190):

> "But, estimates are not 'speculative' except in the loosest sense of the term, simply because they are estimates. And particularly is this so where the estimates are based on the application of actuarial standards as in the case of pensions and insurance.

> In composing its offer the Company considered the cost estimates prepared by its experts as sufficiently reliable for it to support a business judgment thereon. The Company was not being asked to guarantee that future experience would prove its cost projections accurate. The fact that the estimates might be subject to a possible margin of error neither destroyed their value to the negotiators nor excused their withholding."

The court agreed (A-33):

> "GE had most of the information in some form that would have been useful to the Union, and easily could have either presented it in that form, or at least advised the Union that it had other relevant information * * * available."

The sixth question as framed in the petition is not presented by the record below.

II.

ALL OF THE HOLDINGS OF THE COURT BELOW TURN ON GE'S SUBJECTIVE BAD FAITH AND HENCE PRESENT NO ISSUE OF LAW FOR REVIEW OF THIS COURT.

We believe that none of the questions urged upon this Court by the petition (pp. 2-4) is presented by the record below. To the extent that any of the issues suggested by these questions may seem worthy of review, we wish to emphasize to the Court their intertwinement with the subjective bad faith findings to such an extent as to make all these issues essentially factual rather than legal. Both the Board (C-7-9, 212) and the court below viewed all the conduct of GE, which was found by the Trial Examiner, as part of an overall "pattern of illegal activity designed primarily to subvert the Union" and motivated by "anti-Union animus" (A-41).

In their rulings on each of the issues which may inhere in any questions presented, both the Board and the court carefully delineated the subjective bad faith aspects of GE's conduct.

The course of dealing between the parties which petitioner would defend as constituting good faith bargaining was attended by the twenty-six indicia of bad faith listed in our statement of the Board's findings of fact (pp. 4-8, *supra*). Subjective bad faith consisted in part of entering into the pre offer meetings "without any intent to attempt to reach agreement" (C-214-215), making an "unresponsive" offer (C-217, 220) and then going through post offer negotiations as "an empty exercise with predetermined results" (C-220). GE engaged "in negotiations with an attitude that was one of evasion" (C-227). The court summed these up as demonstrating "an absence of subjective good faith" (A-53).

The Board found GE's communications were further evidence of bad faith. "The tactic of attacking the motives of the IUE leadership had been decided upon as a communications approach long in advance of the negotiations" (C-73, 232). The communications contained "misrepresentations of fact" (C-61, 66, 70, 83, 96, 107-108, 115, 150, 232, 248), threats of reprisal and offers of benefits (C-129-131, 156-157, 235, 247). They reflected "a conscious and deliberate purpose to play on employees' fears and insecurities" (C-235).

The Board found that GE's presentation to the union of an accident insurance proposal and then refusing to bargain about it reflected "adversely on [GE's] general attitude toward collective bargaining" (C-213). The court below characterized GE's conduct with re-

spect to the accident insurance proposal as "clearly designed to show the employees that the Union could win them nothing more than the Company was prepared to offer" (A-21-22).

Even with respect to the failure to supply information requested by the union, the Board (C-248) and the court below (A-33-34, fn. 10) each found the refusal was motivated by subjective bad faith.

In view of the foregoing findings we submit that none of the questions tendered by the petition is presented by the record below as a legal issue as contrasted with a factual issue.

III.

NONE OF THE HOLDINGS OF THE COURT BELOW IS IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OF THE COURTS OF APPEALS.

All of the claims of conflict with decisions of this Court and other courts of appeals made in the petition (pp. 14-35) rest on the same false assumptions as to the facts in the instant case as characterize the framing of the questions presented.

The claimed conflicts with *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952) (Pet. pp. 13, 18), *NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477, 488-489 (1960) (Pet. pp. 14, 17, 19, 20, 25) and *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 154-155 (1956) (Pet. pp. 16, 36), rest, as is apparent from the petition, on the false assumption that here GE had a "sincere desire to reach agreement" (Pet. pp. 14-15, fn. 12, 16) and did nothing to "frustrate agreement" (Pet. pp. 16, 17), whereas both the Board and the court found GE had no intent to reach agreement (see pp. 14-16, *supra*).

Petitioner (Pet. pp. 16-17, 24, 25) relies heavily on *United Mine Workers of America* v. *Pennington,* 381 U.S. 657, 665 (1965) for the proposition that this Court recognized area standards or pattern bargaining as valid. There this Court held that the union "may * * * seek to obtain the same terms" from all employers, adding in footnote 2 that "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it". The *Pennington* case arose under anti-trust legislation and presented no issue with respect to the duty to bargain collectively. The Court at no place suggested that in pursuing area standards the union was relieved of good faith bargaining with each employer. The Board has held that a union is guilty of a refusal to bargain where it attempts to impose area standards without good faith bargaining with an employer. *International Brotherhood of Electrical Workers and Phil Sears,* 9-CB-1455, etc., decided January 28, 1970 (DLR 2/4/70 p. A-9). As this Court pointed out in *NLRB* v. *Insurance Agents Int'l Union,* 361 U.S. 477, 487, 506, fn. 3 (1960) the legislative history of the Labor Management Relations Act discloses that Congress aimed Section 8(b)(3) primarily at such take-it-or-leave-it tactics by unions. 93 Cong. Rec. 4135, 4363, 4581, 5005; 2 Leg. His. LMRA 1947, 1062, 1172, 1244, 1479. Nothing this Court stated in *Pennington* indicates that pure take-it-or-leave-it tactics satisfy Section 8(a)(5) or 8(b)(3).

Nor does the recognition by this Court that "it is not the announced posture of the parties but rather their relative bargaining strengths which determines whether and to what extent they will yield" (Pet. p. 25), indicate that the strength of either party may be

used to impose a contract without good faith collective bargaining.

With respect to the claimed conflict with free speech decisions, *Thomas* v. *Collins,* 323 U.S. 516, 532 (1944) (Pet. pp. 27-28), *Linn* v. *United Plant Guard Workers of America,* 383 U.S. 53, 62 (1966) (Pet. p. 28), *Coppus Engineering Corp.* v. *NLRB,* 240 F.2d 564 (1st Cir. 1957) (Pet. pp. 28-29) and *NLRB* v. *Colvert Dairy Products Co.,* 317 F.2d 44, 46 (10th Cir. 1963) (Pet. p. 29), petitioner's contention is based on the same erroneous view of the findings of fact herein as we have already set forth in showing that the questions stated in the petition with respect to GE's communications program are not presented by the record in this case (pp. 16-17, *supra*). Here GE's communications in addition contained misrepresentations, threats of reprisal and promises of benefit (see p. 22, *supra*). Nothing in any of the cases cited suggests such communications are protected free speech.

Even if a conflict with *General Electric Co.* v. *NLRB,* 412 F.2d 512 (2d Cir. 1969), existed, since that decision was by the same court of appeals as the instant case, this does not constitute the conflict between circuits which calls for resolution by this Court. Moreover, the earlier *GE* decision is not in conflict with this one. The issue in the earlier *GE* case was whether, when GE had agreed with the union to begin negotiations prior to the date required by law, GE could make its discretionary participation in such early negotiations conditional on exclusion from the union's bargaining committee, for the discretionary meetings, of all members or representatives of other unions. The court of appeals held GE could so condition its discretionary participation in early negotiations.

Here GE by proposing a new accident insurance program, opened the subject of accident insurance during the time when by contract terms it was not open for negotiations. By opening the subject and then refusing the union's request to bargain on GE's own proposals, GE insisted on its right to make a unilateral decision respecting accident insurance without collective bargaining. The earlier decision involved no element of GE's effort at unilateral imposition of substantive terms without bargaining with the union but solely went to the propriety of GE's procedural limitation that if it was to meet before in law it was required to meet, it would meet only with the union's regular committee rather than one enlarged by the addition of persons with affiliation with other unions. The two issues are totally unrelated.

NLRB v. *Lion Oil Company*, 352 U.S. 282 (1957) (Pet. p. 35) does not suggest that an employer who seeks to disrupt the status quo during the term of a contract, can do so without willingly accepting the union's request for bargaining. In *Lion Oil* this Court had before it a contract which permitted a reopening for modification during the term of the contract. This Court, recognizing the uselessness of negotiations without a power to resort to economic sanctions, held that the union, after giving the 60 day notice required by Section 8(d), could strike in support of its modification proposal.

And in *NLRB* v. *Honolulu Star-Bulletin, Inc.*, 372 F.2d 691 (9th Cir. 1967) (Pet. p. 35) the court merely held that a union could not insist on the employer's bargaining about a bonus when, during the term of a contract which foreclosed bargaining about that subject for the duration of the contract, the union requested

the company so to bargain. Here it was the employer that wanted to institute a new accident insurance program. The *Honolulu Star* ruling would absolve the union of an 8(b)(3) if it had refused to bargain about the accident insurance proposal. That ruling has no applicability when it is the employer who proposes a change, the union requests bargaining, and the employer refuses to bargain.

The claim of conflict with the principle requiring specific and objective standards, for which the petition (p. 31) cites *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433 (1963) confuses the requirements of criminal statutes with those of equity decrees. The cited case dealt, and the quoted portion of the opinion is concerned, only with criminal statutes. Under the National Labor Relations Act it is well established that once bad faith bargaining is found a decree requiring good faith bargaining is sufficiently definite. *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 432 (1941); *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 156 (1956); *NLRB* v. *Celotex Corp.*, 364 F.2d 552, 554 (5th Cir., 1966), cert. denied, 385 U.S. 987. As the court below stated "before a court would undertake to cite either a union or an employer for contempt, it would afford the party every opportunity to show that it was not contumacious and had made a good faith effort to comply with the terms of the bargaining order" (A-54, fn. 19).

IV.

THE DECISION BELOW IS CORRECT AND PRESENTS NO ISSUES REQUIRING REVIEW BY THIS COURT.

Given the twenty-six indicia of bad faith bargaining (see pp. 4-8, *supra*), which rested on findings which are not contested in the court below, the decision below was clearly correct and presents no issue for review

here. This Court has pointed out that "a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case" and hence particular factual applications call for the Court's "usual rule of non-interference where the conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 410 (1952); *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951). The instant case turns entirely on its particular facts. It does not deserve review by this Court.

CONCLUSION

For the foregoing reasons it is urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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